Aquaslide 'N' Dive Corporation *and* Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO. Case 23-CA-8839

August 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Upon a charge filed on March 4, 1982, by Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO, herein called the Union, and duly served on Aquaslide 'N' Dive Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint and notice of hearing on April 5, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 5, 1982, following a Board election in Case 23-RC-4972, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 26, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 19, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 10, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 20, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent denies that it unlawfully has refused to bargain with the Union, and denies that the Union is a labor organization within the meaning of the Act. Respondent admits all other allegations of the complaint. Respondent further asserts that the election in Case 23-RC-4972 was held at a time when a substantial and representative group of the unit employees had no opportunity to cast ballots. It contends that the Board improperly denied its request for review of the Regional Director's findings concerning these issues. Respondent argues in the alternative that the Union's certification is invalid in that the Board erred by overruling its objections to the election held in Case 23-RC-4972.

Counsel for the General Counsel argues that Respondent is attempting to litigate issues which were, or could have been, raised in the underlying representation proceeding. We agree with the General Counsel's contention.

An examination of the entire record herein, including that of the representation proceeding in Case 23-RC-4972, discloses that the Regional Director issued a Decision and Direction of Election on April 22, 1981.[2] By telegram dated May 19, the Board denied Respondent's request for review. The election in Case 23-RC-4972 was conducted on May 22. The tally of ballots shows that, of approximately 442 eligible voters, 282 cast ballots for, and 88 against, the Union; there were 20 challenged ballots, an insufficient number to affect the results, and 1 void ballot. Respondent subsequently filed timely objections to conduct affecting the results of the election. Since the preliminary investigation disclosed that Respondent's Objection 1 raised substantial and material issues of fact requiring resolution at a hearing, the Regional Director, on June 30, directed a hearing on this objection.[3]

After a hearing in which both Respondent and the Union participated, the Hearing Officer, on August 17, issued and served upon the parties his

[1] Official notice is taken of the record in the representation proceeding, Case 23-RC-4972, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] All dates are in 1981, unless otherwise indicated.

[3] The Regional Director also approved Respondent's request to withdraw its Objections 2 and 3.

Report on Objections in which he recommended overruling Respondent's objection and certifying the Union. Respondent then filed timely exceptions to the Hearing Officer's report. On February 5, 1982,[4] the Board issued its Decision and Certification of Representative wherein it adopted the Hearing Officer's recommendation to overrule Respondent's objection and, thus, certified the Union as the exclusive bargaining representative of Respondent's employees in the appropriate unit.

In its response to the Notice To Show Cause, Respondent raises again its contention made in the underlying representation proceeding, Case 23-RC-4972, that the Union is not a labor organization within the meaning of Section 2(5) of the Act because it is only a division of the National Maritime Union, rather than a separate labor organization. Respondent submits documents showing that on May 19, 1982, the "National Maritime Union" filed in a Federal court a motion seeking to enjoin Respondent and its agents from carrying or discharging firearms in the vicinity of a picket line established by the unit employees. Based on this evidence, Respondent contends that, since the National Maritime Union, and not the Industrial, Technical and Professional Employees Division, is the labor organization moving for injunctive relief in that case, therefore the National Maritime Union is claiming to represent the unit employees in disregard of the certification issued by the Board. Simply because another union has sought an injunction against Respondent is no reason to conclude that the certified union is not a labor organization. Respondent does not allege that the certified Union has abandoned its certification as the exclusive representative of the unit employees for collective-bargaining purposes, nor is there any evidence that it has done so. We have reviewed the submissions relating to the Federal court case and we do not see how they support Respondent's argument. We note that since the certified Union is a division of the National Maritime Union, which filed the motion in Federal court, it seems probable that the omission of the name of the certified Union from the pleadings in that case was either inadvertent or that its inclusion was deemed unnecessary. In any event, we find that the evidence submitted by Respondent fails to raise any issue warranting denial of the Motion for Summary Judgment.

As for Respondent's other contentions in opposition to the Motion for Summary Judgment, it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, except as discussed above, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Aquaslide 'N' Dive Corporation, a Texas corporation, maintains an office and place of business in Brownsville, Texas, where it is engaged in the manufacture of fiberglass swimming pool accessories. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations, sold and shipped from its Brownsville, Texas, facilities goods and materials valued in excess of $50,000 directly to points located outside the State of Texas. During this same period, Respondent derived gross revenues in excess of $1 million from the manufacture of fiberglass swimming pool accessories.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[4] Not reported in volumes of Board Decisions.

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its facility located at 11 Southside Road, Port Brownsville, Brownsville, Texas; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On May 22, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 23 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on February 5, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about February 8, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 26, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since February 26, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Aquaslide 'N' Dive Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its facility located at 11 Southside Road, Port Brownsville, Brownsville, Texas; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 5, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 26, 1982, and at all times thereafter, to bargain collectively

with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Aquaslide 'N' Dive Corporation, Brownsville, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its facility located at 11 Southside Road, Port Brownsville, Brownsville, Texas; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Brownsville, Texas, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed by the Employer at its facility located at 11 Southside Road, Port Brownsville, Brownsville, Texas; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

AQUASLIDE 'N' DIVE CORPORATION